(5)

No. 04-1367

Supreme Court, U.S.
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In The

Supreme Court of the United States

KENIA MARITZA CINTRÓN PARRILLA, ET AL,

Pro Se Petitioners,

v.

ELI LILLY INDUSTRIES, INC., ET AL,

Respondents.

On a Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR REHEARING

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QUESTIONS PRESENTED

1. Whether an interlocutory judgment and an interlocutory order have to be appealed before the final judgment, when they require further action and are directly related to the final judgment, in light of the 28 USC sections 1291 and 1292, USCA Rule 54, USCA Rule 58, USCA Rule 4.

2. Whether a failure to comply with a binding settlement agreement as can be enforce redress or obtain any other remedy under the statues and/or applicable laws in light of Contract and Tort Law, Civil Rights Act, 42 USC §§1981, 1983 and 1988.

3. What standard of review is used when a fiduciary or plan administrator failed to comply with the terms and procedures under the disability benefits plan and did not give full and fair evaluation to a disability claim in light of 29 USC §§1001, 1022, 1132, 1133 and 29 CFR §2560.503-1, among others, pursuant to ERISA.

4. Can plan administrator or fiduciary request an amendment to the disability benefits plan as a condition to determine claimant's disability benefits?

PARTIES

As per stated in the Second Amended Complaint filed in the District Court Docket (D.D.) Number 42, the Petition for Writ of Certiorari ("Petition") and the Petitioners Reply to Brief in Opposition (Reply):

Plaintiffs-Petitioners

1. Kenia M. Cintrón Parrilla ("Mrs. Cintrón"), worked as an employee for Eli Lilly del Caribe, Inc., (before named Eli Lilly Industries, Inc.), Puerto Rico Branch, a subsidiary of Eli Lilly Industries, Inc. ("Lilly" or "Eli Lilly"), for approximately 20 years, as a chemist and senior quality assurance representative. As a Lilly employee Mrs. Cintrón is a participant in all of Lilly's E.R.I.S.A. plans and is entitled to the other employee benefits.

2. Miguel A. García Mendez ("Mr. García") is the husband of Kenia M. Cintrón Parrilla, and together they form a legal conjugal partnership.

Defendants-Respondents

3. Eli Lilly Industries, Inc. Health, and Welfare and Disability Plan, and/or Eli Lilly Puerto Rico Extended Disability Plan (the "Lilly Plan"), is an employee welfare benefit plan, and those terms are defined in Section 3 (1) and (3) of E.R.I.S.A., 29 U.S.C. sec. 1002 (1) and (3), and thus subject to the provisions of E.R.I.S.A., 29 U.S.C. §§ 1001 et seq. The Lilly Plan covers employees and former employees of Eli Lilly Industries, Inc. and/or Eli Lilly del Caribe, Inc., Puerto Rico Branch, and hence it covers the Plaintiff-Petitioner Kenia M. Cintrón Parrilla.

4. Eli Lilly del Caribe, Inc. and/or Eli Lilly Industries, Inc., ("Lilly" or "Eli Lilly"), is a private corporation doing

business in Puerto Rico, with its main business office located in Carolina, Puerto Rico, and it is the administrator and/or fiduciary or trustee of the Lilly Plan for its Employees or former employees in Puerto Rico.

5. Company X is the health, welfare and disability plan of the Eli Lilly employees.

6. Company Y is the administrator and/or fiduciary or trustee of the health, welfare and disability plan of the Eli Lilly employees, which is either natural or juridical person.

7. Company A is the Eli Lilly Puerto Rico Employees Welfare Plan.

8. Company B is the administrator and/or fiduciary or trustee of the Eli Lilly Puerto Rico Employee Welfare Plan.

9. Company C is the Retirement Plan of Eli Lilly Industries Inc. and/or Eli Lilly del Caribe, Inc.

10. Company D is the administrator and fiduciary or trustee of the Retirement Plan of Eli Lilly Industries, Inc., and/or Lilly del Caribe, Inc.

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GROUNDS FOR THE PETITION FOR REHEARING

A. The Court of Appeals For The First Circuit Erred When Dismissed As Untimely Petitioners' Appeal For Judgment And Orders

The Court of Appeals dismissed as untimely August 14, 2002 Judgment, July 1, 2003, November 24, 2003, December 19, 2003 Orders. See District Docket ('D.D") #77, #88, #95, #98; First Circuit Court of Appeals General Docket date ("AD"): 10/1/04; Petition for Writ of Certiorari ("Petition"), App.1-9;

August 2002 Judgment states: "The case is closed, subject to reopening for the limited review contemplated by the parties.", pursuant to a Joint motion for a partial dismissal, with the exception of Petitioner's long-term disability claim pursuant to section 502(a) of ERISA, allowing a judicial review. See, D.D. #77, #75, (Petition, App.5, 128).

July 2003 Order states: "The settlement agreement requires full exhaustion of Eli Lilly's Disability Plan procedures. Until this is accomplished, the court will not consider relieving any party from the term of the settlement." pursuant to a motion due to Respondent breach of agreement See D.D. #88 (Petition, App. 7).

Pursuant to 28USC §§1291 and 1292(b) the courts of appeals shall have jurisdiction of appeals from 'final decisions'. Also, 28USCA Rule 54(a) states: ""Judgment" ... includes a decree and any order from which an appeal lies." and 28USCA Rule 54(b) states:

> "any order, ...which adjudicates fewer than all claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, ...is subject to revision at any time before

the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties"

See Rehearing, App. 32, 33, 34, 63.

28USCA Rule 54, Notes of Advisory Committee on Rules – 1946 Amendment, states: "The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute.", citing Hohorst v. Hamburg-American Packet Co. (1893) 148 U.S. 262; Rexford v. Brunswick-Balke-Collender Co. (1913) 228 U.S. 339; Collins v. Miller (1920) 252 U.S. 364. See Rehearing, App.64.

Hence, August 2002 Judgment and July 2003 Order were 'interlocutory' decisions, not 'final' decisions, thus were not appealable until final a judgment was filed, since both are 'related' and required further actions. (See definitions for 'interlocutory' and 'final' decisions in this Rehearing, App.1)

28USCA Rule 58 (a)(2)(A)(iii) states: "Subject to Rule 54(b): unless the court orders otherwise, the clerk must without waiting the court's direction, promptly prepare, sign, and enter the judgment when: the court denies all relief." See Rehearing App.67. Also, 28USCA Rule 58 Committee Notes on Rules – 2002 Amendment states: "Rule 54(b) which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."." See Rehearing, App.73. See also, 28USCA Rule 18 and the Notes of Advisory Committee on Rule and Amendments. See Rehearing, App.58-62.

November 24, 2003 Order states only the word "Denied", pursuant to a timely filed Petitioners' motion for Request for Review, which included the August 2002 Judgment and July

2003 Order, after the "full exhaustion" of the procedures for the Disability Plan and the Agreement, as required. In addition, the Request for Review requested to relieve Petitioner of her obligations due to breach of agreement by Respondents, among others and enclosed a copy of the July 2003 Order identified as Exhibit 20. See D.D. #90 (Petition, App.163, 443, 444). Thus, the time to file reconsideration for August 2002 Judgment, July 2003 and November 2003 Orders started to run on November 24, 2003.

Since the November 2003 Order had no reason for denial Petitioners did not have a well understanding of the judicial review, if any, in order to adequately file reconsideration or appeal. See D.D. #95 (Petition, App.8).

The December 2003 Order states: "The reasons appear from the record and are summarized in docket 93", pursuant to a timely filed Petitioners' motion for reconsideration under Rule 59(e) and requesting the reasons for Request for Review denial ("Reconsideration") for the November 2003 Order. This December 2003 Order was not a final judgment because only addressed the reasons for the Request of Review denial but did not address the Reconsideration. See D.D. #98 (Petition, App.9).

Pursuant to 28USCA Rule 60(a), 28 USCA Rule 58(b) and 58(d), 28USCA 59(e), 28USCA 4(a)(4) and 4(a)(7), Petitioners filed a timely motion requesting the Reconsideration to be denied or granted due to lack of ruling See D.D. #99 (Petition App.480). 28USCA Rule 60(a):

> "Clerical mistakes in judgments, orders … and errors therein arising from oversight or omission may be corrected by the court its own initiative or on the motion of any party and after such notice, if any as the court orders. During the pendency of an appeal,

> the mistakes may be corrected before the appeal is docketed in the appellate co[illegible]"

See Rehearing, App.76. Also, 28USCA Rule 58(d) states: "A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1)." See Rehearing, App.67. Also, 28USCA Rule 58(a)(1) and 28USCA Rule 4(a)(7) state that the time to file an appeal start to run when the earlier of these two events occurs, when judgment or order is set forth on a separate document or when 150 days have run from entry of the judgment or order in the civil docket under Rule 79(a). See Rehearing, App.67, 44.

28USCA Rule 58, Notes of Advisory Committee on Rules – 1963 Amendment states:

> "Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for postverdict motions and for the purpose of appeal."

See Rehearing, App.69. Also, 28USCA Rule 58, Committee Notes on Rules – 2002 Amendment states: "The new provision allowing any party to move for entry of judgment

on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement." See Rehearing, App.73.

28USCA Rule 4, Committee Notes on Rules – 1963 Amendment states

> "New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in Mallis and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run."

And, "... potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights." See Rehearing, App.53, 55.

The first February 25, 2004 Order states: "The motion for reconsideration has been properly documented and denied." pursuant to the timely motion for the Reconsideration to be denied or granted. This is the final order for the Reconsideration. See D.D. #101 (Petition, App.10)

The second February 25, 2004 Order, finding as moot the motion for extension of time to hire a new attorney and to file a second reconsideration and/or to appeal, states: "This case is close for all purposes." See D.D. #102 (Petition, App.11).

Thus, the appeal for the August 2002 Judgment, July 2003, November 2003, December 2003 and February 2004 Orders were timely filed on March 22, 2004, pursuant to 28USC §§1291 and 1292; 28USCA Rule 4(a)(4) and 4(a)(7); 28USCA Rule 54(a) and (b); 28USCA Rule 58(a)(1), (b) and (d) 28USCA Rule 59(e); 28USCA Rule 60(a). See D.D #103.

B. The Court Of Appeals For The First Circuit Erred When Affirmed The District Court Orders

The Court of Appeals for the First Circuit affirmed both February 2004 Orders based on misconstruction of the facts. The First February Order denying the Reconsideration was erroneously reviewed as a second reconsideration instead of as a final decision for the only Reconsideration that was ever filed. The Court of Appeals misconstrued the Petitioners' request due to a lack of ruling as a second reconsideration. This circumstance was elucidate above under Grounds for the Petition for Rehearing, A.

The second February 2004 Order denying the extension of time was also erroneously misconstrued as an untimely and inexcusable neglect. This motion was even filed before the final judgment of the case was filed. This circumstance was also elucidate above under Grounds for the Petition for Rehearing, A. The main reason to appeal of this motion is because it states: "This case is close for all purposes.", denying to Petitioners the opportunity to appeal.

C. Respondents Failed And Refuse To Comply With The Agreement, US Code, Code Of Federal Regulations, Pursuant To ERISA and The Civil Rights Act

Mrs. Cintrón's filed her claim for 'retroactive disability benefits effective on May 1998' to the Eli Lilly and Company Disability Benefits Committee ("Review Committee" and "Appeal Committee") in compliance with the terms of the Agreement, the Eli Lilly and Company Disability Plan ("Plan"); 29USC §1132, section 502(a) of ERISA; 29CFR 2560.503-1. The receipt of the initial claim was confirmed on August 16, 2002 by Mr. John J. Purcell, designated contact person. See D.D. #90 (Petition, 154-444); Respondents' Brief in Opposition ("Opposition"), 20a-58a; Rehearing App.2-31, 99-110.

29CFR §2560.503-1(b)(5) states: "The claims procedures contain administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are

made in accordance with governing plan documents". Also, 29CFR §2560.503-1(e) states: "a claim for benefits is a request for a plan benefit or benefits made by a claimant in accordance with a plan's reasonable procedure for filing benefit claims." In addition, 29CFR 2560.503-1(f)(3) states: "the plan administrator shall notify the claimant ... the plan's adverse benefit determination within a reasonable period of time, but not later than 45 days after receipt of the claim by the plan." And, 29CFR 2560.503-1(f)(4) states: "the period of time within which a benefit determination is required to be made shall begin at the time a claim is filed in accordance with the reasonable procedures of a plan, without regard to whether all the information necessary to make a benefit determination accompanies the filing." See Opposition, 51a, 52a, 54a, 55a; Rehearing, App.4, 8, 13, 14.

The 45-day determination period for the Review Committee to render a decision expired on September 30, 2002. The Review Committee did not render a decision and did not request any time extension within the initial 45-day determination period. Respondents requested two time extensions after the 45-day determination period had expired, October 2, 2002 and October 28, 2002, in both alleging reasons out of their control. In addition, Respondents changed the definition of the claim filling date to '45 days after provide relevant information to render a decision'. Respondent change the 45-day period to expire on October 3, 2002 because Mrs. Cintrón submitted information received on August 19, 2002. Also, Respondents required Mrs. Cintrón to make physician selections to undergo to independent medical evaluations (IME's) from a list of physicians unknown to her. Neither the request for physician selections nor the IME's are contemplated in any part of the Agreement or the Plan. All these Respondents arbitrarily and

capriciously changes made to cover up their failure to follow and comply terms of the Agreement and the Plan, trying to put the burden on Petitioners alleging that they were given to Mrs. Cintrón the opportunity to select the physicians she preferred. Moreover, Respondents failed again to notify Mrs. Cintrón its denial determination within the 105-day period that was not supposed to be granted. Said determination period expired on November 29, 2002, and the denial letter, dated December 2, 2002, was sent postmarked December 6, 2002, and received on December 10, 2002. Contrary to the Agreement, par. 7, pags. 9, and sections 6.02(b), 6.05(a) of the Plan. See D.D. #90 (Petition, 154-444)

29CFR §2560.503-1(c)(3)(iv) states: "The plan provides to any claimant, ..., sufficient information relating to the ... appeal to enable the claimant to make an informed judgment", also states, "the claimants right to representation, the process for selecting the decisionmaker, and the circumstances, ..., that may affect the impartiality of the decisionmaker, such as any financial or personal interests in the result or any past or present relationship with any party to the review process". 29CFR §2560.503-1(h)(2)(ii) states: "Provide claimants the opportunity to submit written comments, documents, records, and other information relating to the claim for benefits." In addition, 29CFR §2560.503-1(h)(2)(iii) states: "Provide that a claimant shall be provided, ..., reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's claim for benefits." See Rehearing, App.7, 16, 17.

In several occasions, Petitioners requested information to both Committees to clarify her doubts and of the specific additional information that had been prevented them to verify her disability since her the disability claim was retroactive to May 1998. Mainly, because it is not feasible for a physician

to efficiently determine if Mrs. Cintrón was disabled since 1998 unless he/she had evaluated her before. But no response was ever received. Despite the efforts that Mrs. Cintrón made requesting information to perfect her disability claim, the only information given to her were letters requesting IME's and physician selections, and the denial letters, based on subjective interpretations. For example, Respondents alleged that the pain that she feels has poor correlation with some medical selected studies, such as X- rays, CT scans, MRI's. Said studies can detect medical conditions but can not determine the intensity of the pain. However, the studies that proof her disabling conditions and more efficiently evaluate the level of pain such as, Nerve Conduction Velocities and Electromyographic studies, were not considered the by none of the Committees. See D.D. #90 (Petition 154-444).

29CFR §2560.503-1(b)(1) states: "The claims procedures for a plan will be deemed to be reasonable only if …comply with the requirements of paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of this section". Also, 29CFR §2560.503-1(b)(3) states: "The claims procedures do not contain any provision, and are not administered in a way, that unduly inhibits or hampers the initiation or processing of claims for benefits.". 29CFR §2560.503-1(h)(2)(iv) states: "Provide for a review that takes into account all comments, documents, records, and other information submitted by the claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination." See Rehearing, App.2, 3, 17.

Both Committees refused to supply Mrs. Cintrón the specific information required to fulfill her claim and imposed as a condition for the claim determination to make physicians selections and to undergo to IME's. Moreover, Respondents, deliberately misread Mrs. Cintrón's request for a form or

questionnaire, as a guide to supply the required information, and her concern of the procedure changes, as an act against the Committee and a refusal to undergo medical evaluations. Even more, the Appeal Committee purposely delayed the process for more than 39 days to force Mrs. Cintrón to sign an amendment and imposed it as a condition for her claim determination. Furthermore, the Appeal Committee denied Mrs. Cintrón's disability claim because she did not sign the amendment and the denial. Also, the denial letter did not comply with the requirements of 29CFR §2560.503-1(j) and the Plan. See D.D. #90, Opposition; 56a, 57a; Rehearing, 25.

CONCLUSION

Pursuant to the Agreement, paragraph 17, page 11, the performances of the promises of each party are expressly contingent upon the fulfillment and satisfaction of the obligation of the other party as set forth in the Agreement. Respondents did not comply with any of the terms, in violation of 29CFR §2560.503-1; 28USC §§1343(a) and 1331, 1367; 29USC §§1001, 1022, 1024(b), 1025, 1109, 1131, 1132(a) and (c), §1133, 1140; and 42USC §§1981, 1983, 1988. Thus, Petitioners are entitled to redress such violations, enforce any provision of the terms of the Plan and the Agreement or any other equitable and/or legal relief or action in accordance to any statute or applicable law. See Rehearing, App.2-31, 35-38, 82-87, 90-93, 95- 104, 111-118.

Therefore, Petitioners very respectfully request to this Honorable Supreme Court to grant this Petition for Rehearing for a petition for writ of certiorari.

Respectfully submitted,

Kenia M. Cintrón Parrilla

Miguel A. García Méndez

No. 04-1367

In The

Supreme Court of the United States

KENIA MARITZA CINTRÓN PARRILLA, ET AL,

Pro Se Petitioners

v.

ELI LILLY INDUSTRIES, INC., ET AL,

Respondents

CERTIFICATION

We, Kenia M. Cintrón Parrilla and Miguel A. García Méndez, do certify that as required by the Supreme Court Rule 44, we are presenting in good faith and not for delay the **PETITION FOR REHEARING,** for a Petition for Writ of Certiorari, that is restricted to intervene circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

Respectfully submitted, this 8th day of July of 2005, in Naguabo, Puerto Rico.

Kenia M. Cintrón Parrilla
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Black's Law Dictionary
(Abridged Seventh Edition, 2000)

collateral–order doctrine – A doctrine allowing appeal from an interlocutory order that conclusively determines an issue wholly separate from the merits of the action and effectively unreviewable on appeal from a final judgment. – Also termed Cohen doctrine (fr. *Cohen v. Beneficial Indus. LoanCorp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949)). See appealable decision under DECISION. (pag. 210)

final judgment – A court's last action that settles the rights of the parties and disposes of all the issues in controversy, except for the award of cost and enforcement of the judgment. – Also termed final appealable judgment; final decision; final decree; determinative judgment; final appealable order. (pag. 679)

final order – An order that it dispositive of the entire case. See final judgment under JUDGMENT. (pag. 899)

interlocutory judgment – An intermediate judgment that determines a preliminary or subordinate point or plea but does not finally decide the case. – Also termed interlocutory decree. (pag. 679)

interlocutory order – An order that relates to some intermediate matter in the case; any order other than a final order. • Most interlocutory others are not appealable until the case is fully resolved. – Also termed interlocutory decision; interim order; intermediate order. But by rule or statute, most jurisdictions allow some types of interlocutory orders to be immediately appealed. – Also termed interlocutory decision; interim order; intermediate order. See appealable decision under DECISION; COLLATERAL–ORDER DOCTRINE. (pag. 899)

29 CFR §2560.503-1

Title 29 – Labor

Chapter XXV – Pension And Welfare Benefits Administration

Part 2560: Rules And Regulations For Administration And Enforcement

Sec. 2560.503-1: Claims procedure.

(a) Scope and purpose. In accordance with the authority of sections 503 and 505 of the Employee Retirement Income Security Act of 1974 (ERISA or the Act), 29 U.S.C. 1133, 1135, this section sets forth minimum requirements for employee benefit plan procedures pertaining to claims for benefits by participants and beneficiaries (hereinafter referred to as claimants). Except as otherwise specifically provided in this section, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Act.

(b) Obligation to establish and maintain reasonable claims procedures. Every employee benefit plan shall establish and maintain reasonable procedures governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations (hereinafter collectively referred to as claims procedures). The claims procedures for a plan will be deemed to be reasonable only if--

(1) The claims procedures comply with the requirements of paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of this section, as appropriate, except to the extent that the claims procedures are deemed to comply with some or all of such provisions pursuant to paragraph (b)(6) of this section;

(2) A description of all claims procedures (including, in the case of a group health plan within the meaning of paragraph (m)(6) of this section, any procedures for obtaining prior approval as a prerequisite for obtaining a benefit, such as preauthorization procedures or utilization review procedures) and the applicable time frames is included as part of a summary plan description meeting the requirements of 29 CFR 2520.102-3;

(3) The claims procedures do not contain any provision, and are not administered in a way, that unduly inhibits or hampers the initiation or processing of claims for benefits. For example, a provision or practice that requires payment of a fee or costs as a condition to making a claim or to appealing an adverse benefit determination would be considered to unduly inhibit the initiation and processing of claims for benefits. Also, the denial of a claim for failure to obtain a prior approval under circumstances that would make obtaining such prior approval impossible or where application of the prior approval process could seriously jeopardize the life or health of the claimant (e.g., in the case of a group health plan, the claimant is unconscious and in need of immediate care at the time medical treatment is required) would constitute a practice that unduly inhibits the initiation and processing of a claim;

(4) The claims procedures do not preclude an authorized representative of a claimant from acting on behalf of such claimant in pursuing a benefit claim or appeal of an adverse benefit determination. Nevertheless, a plan may establish reasonable procedures for determining whether an individual has been authorized to act on

behalf of a claimant, provided that, in the case of a claim involving urgent care, within the meaning of paragraph (m)(1) of this section, a health care professional, within the meaning of paragraph (m)(7) of this section, with knowledge of a claimant's medical condition shall be permitted to act as the authorized representative of the claimant; and

(5) The claims procedures contain administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants.

(6) In the case of a plan established and maintained pursuant to a collective bargaining agreement (other than a plan subject to the provisions of section 302(c)(5) of the Labor Management Relations Act, 1947 concerning joint representation on the board of trustees)--

(i) Such plan will be deemed to comply with the provisions of paragraphs (c) through (j) of this section if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference--

(A) Provisions concerning the filing of benefit claims and the initial disposition of benefit claims, and

(B) A grievance and arbitration procedure to which adverse benefit determinations are subject.

(ii) Such plan will be deemed to comply with the provisions of paragraphs (h), (i), and (j) of this section (but will not be deemed to comply with paragraphs (c) through (g) of this section) if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference a grievance and arbitration procedure to which adverse benefit determinations are subject (but not provisions concerning the filing and initial disposition of benefit claims).

(c) Group health plans. The claims procedures of a group health plan will be deemed to be reasonable only if, in addition to complying with the requirements of paragraph (b) of this section--

(1) (i) The claims procedures provide that, in the case of a failure by a claimant or an authorized representative of a claimant to follow the plan's procedures for filing a pre-service claim, within the meaning of paragraph (m)(2) of this section, the claimant or representative shall be notified of the failure and the proper procedures to be followed in filing a claim for benefits. This notification shall be provided to the claimant or authorized representative, as appropriate, as soon as possible, but not later than 5 days (24 hours in the case of a failure to file a claim involving urgent care) following the failure. Notification may be oral, unless written notification is requested by the claimant or authorized representative.

(ii) Paragraph (c)(1)(i) of this section shall apply only in the case of a failure that--

(A) Is a communication by a claimant or an authorized representative of a claimant that is received by a person or organizational unit customarily responsible for handling benefit matters; and

(B) Is a communication that names a specific claimant; a specific medical condition or symptom; and a specific treatment, service, or product for which approval is requested.

(2) The claims procedures do not contain any provision, and are not administered in a way, that requires a claimant to file more than two appeals of an adverse benefit determination prior to bringing a civil action under section 502(a) of the Act;

(3) To the extent that a plan offers voluntary levels of appeal (except to the extent that the plan is required to do so by State law), including voluntary arbitration or any other form of dispute resolution, in addition to those permitted by paragraph (c)(2) of this section, the claims procedures provide that:

(i) The plan waives any right to assert that a claimant has failed to exhaust administrative remedies because the claimant did not elect to submit a benefit dispute to any such voluntary level of appeal provided by the plan;

(ii) The plan agrees that any statute of limitations or other defense based on timeliness is tolled during the time that any such voluntary appeal is pending;

(iii) The claims procedures provide that a claimant may elect to submit a benefit dispute to such voluntary level of appeal only after exhaustion of

the appeals permitted by paragraph (c)(2) of this section;

(iv) The plan provides to any claimant, upon request, sufficient information relating to the voluntary level of appeal to enable the claimant to make an informed judgment about whether to submit a benefit dispute to the voluntary level of appeal, including a statement that the decision of a claimant as to whether or not to submit a benefit dispute to the voluntary level of appeal will have no effect on the claimant's rights to any other benefits under the plan and information about the applicable rules, the claimant's right to representation, the process for selecting the decisionmaker, and the circumstances, if any, that may affect the impartiality of the decisionmaker, such as any financial or personal interests in the result or any past or present relationship with any party to the review process; and

(v) No fees or costs are imposed on the claimant as part of the voluntary level of appeal.

(4) The claims procedures do not contain any provision for the mandatory arbitration of adverse benefit determinations, except to the extent that the plan or procedures provide that:

(i) The arbitration is conducted as one of the two appeals described in paragraph (c)(2) of this section and in accordance with the requirements applicable to such appeals; and

(ii) The claimant is not precluded from challenging the decision under section 502(a) of the Act or other applicable law.

(d) Plans providing disability benefits. The claims procedures of a plan that provides disability benefits will be deemed to be reasonable only if the claims procedures comply, with respect to claims for disability benefits, with the requirements of paragraphs (b), (c)(2), (c)(3), and (c)(4) of this section.

(e) Claim for benefits. For purposes of this section, a claim for benefits is a request for a plan benefit or benefits made by a claimant in accordance with a plan's reasonable procedure for filing benefit claims. In the case of a group health plan, a claim for benefits includes any pre-service claims within the meaning of paragraph (m)(2) of this section and any post-service claims within the meaning of paragraph (m)(3) of this section.

(f) Timing of notification of benefit determination.

(1) In general. Except as provided in paragraphs (f)(2) and (f)(3) of this section, if a claim is wholly or partially denied, the plan administrator shall notify the claimant, in accordance with paragraph (g) of this section, of the plan's adverse benefit determination within a reasonable period of time, but not later than 90 days after receipt of the claim by the plan, unless the plan administrator determines that special circumstances require an extension of time for processing the claim. If the plan administrator determines that an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of

time and the date by which the plan expects to render the benefit determination.

(2) Group health plans. In the case of a group health plan, the plan administrator shall notify a claimant of the plan's benefit determination in accordance with paragraph (f)(2)(i), (f)(2)(ii), or (f)(2)(iii) of this section, as appropriate.

(i) Urgent care claims. In the case of a claim involving urgent care, the plan administrator shall notify the claimant of the plan's benefit determination (whether adverse or not) as soon as possible, taking into account the medical exigencies, but not later than 72 hours after receipt of the claim by the plan, unless the claimant fails to provide sufficient information to determine whether, or to what extent, benefits are covered or payable under the plan. In the case of such a failure, the plan administrator shall notify the claimant as soon as possible, but not later than 24 hours after receipt of the claim by the plan, of the specific information necessary to complete the claim. The claimant shall be afforded a reasonable amount of time, taking into account the circumstances, but not less than 48 hours, to provide the specified information. Notification of any adverse benefit determination pursuant to this paragraph (f)(2)(i) shall be made in accordance with paragraph (g) of this section. The plan administrator shall notify the claimant of the plan's benefit determination as soon as possible, but in no case later than 48 hours after the earlier of--

(A) The plan's receipt of the specified information, or

(B) The end of the period afforded the claimant to provide the specified additional information.

(ii) Concurrent care decisions. If a group health plan has approved an ongoing course of treatment to be provided over a period of time or number of treatments--

(A) Any reduction or termination by the plan of such course of treatment (other than by plan amendment or termination) before the end of such period of time or number of treatments shall constitute an adverse benefit determination. The plan administrator shall notify the claimant, in accordance with paragraph (g) of this section, of the adverse benefit determination at a time sufficiently in advance of the reduction or termination to allow the claimant to appeal and obtain a determination on review of that adverse benefit determination before the benefit is reduced or terminated.

(B) Any request by a claimant to extend the course of treatment beyond the period of time or number of treatments that is a claim involving urgent care shall be decided as soon as possible, taking into account the medical exigencies, and the plan administrator shall notify the claimant of the benefit determination, whether adverse or not, within 24 hours after receipt of the claim by the plan, provided that any such claim is made to the

plan at least 24 hours prior to the expiration of the prescribed period of time or number of treatments. Notification of any adverse benefit determination concerning a request to extend the course of treatment, whether involving urgent care or not, shall be made in accordance with paragraph (g) of this section, and appeal shall be governed by paragraph (i)(2)(i), (i)(2)(ii), or (i)(2)(iii), as appropriate.

(iii) Other claims. In the case of a claim not described in paragraphs (f)(2)(i) or (f)(2)(ii) of this section, the plan administrator shall notify the claimant of the plan's benefit determination in accordance with either paragraph (f)(2)(iii)(A) or (f)(2)(iii)(B) of this section, as appropriate.

(A) Pre-service claims. In the case of a pre-service claim, the plan administrator shall notify the claimant of the plan's benefit determination (whether adverse or not) within a reasonable period of time appropriate to the medical circumstances, but not later than 15 days after receipt of the claim by the plan. This period may be extended one time by the plan for up to 15 days, provided that the plan administrator both determines that such an extension is necessary due to matters beyond the control of the plan and notifies the claimant, prior to the expiration of the initial 15-day period, of the circumstances requiring the extension of time and the date by which the plan expects to render a decision. If such an extension is necessary due to a failure of the claimant to submit the information

necessary to decide the claim, the notice of extension shall specifically describe the required information, and the claimant shall be afforded at least 45 days from receipt of the notice within which to provide the specified information. Notification of any adverse benefit determination pursuant to this paragraph (f)(2)(iii)(A) shall be made in accordance with paragraph (g) of this section.

(B) Post-service claims. In the case of a post-service claim, the plan administrator shall notify the claimant, in accordance with paragraph (g) of this section, of the plan's adverse benefit determination within a reasonable period of time, but not later than 30 days after receipt of the claim. This period may be extended one time by the plan for up to 15 days, provided that the plan administrator both determines that such an extension is necessary due to matters beyond the control of the plan and notifies the claimant, prior to the expiration of the initial 30-day period, of the circumstances requiring the extension of time and the date by which the plan expects to render a decision. If such an extension is necessary due to a failure of the claimant to submit the information necessary to decide the claim, the notice of extension shall specifically describe the required information, and the claimant shall be afforded at least 45 days from receipt of the notice within which to provide the specified information.

(3) Disability claims. In the case of a claim for disability benefits, the plan administrator shall notify the claimant, in accordance with paragraph (g) of this section, of the plan's adverse benefit determination within a reasonable period of time, but not later than 45 days after receipt of the claim by the plan. This period may be extended by the plan for up to 30 days, provided that the plan administrator both determines that such an extension is necessary due to matters beyond the control of the plan and notifies the claimant, prior to the expiration of the initial 45-day period, of the circumstances requiring the extension of time and the date by which the plan expects to render a decision. If, prior to the end of the first 30-day extension period, the administrator determines that, due to matters beyond the control of the plan, a decision cannot be rendered within that extension period, the period for making the determination may be extended for up to an additional 30 days, provided that the plan administrator notifies the claimant, prior to the expiration of the first 30-day extension period, of the circumstances requiring the extension and the date as of which the plan expects to render a decision. In the case of any extension under this paragraph (f)(3), the notice of extension shall specifically explain the standards on which entitlement to a benefit is based, the unresolved issues that prevent a decision on the claim, and the additional information needed to resolve those issues, and the claimant shall be afforded at least 45 days within which to provide the specified information.

(4) Calculating time periods. For purposes of paragraph (f) of this section, the period of time within which a

benefit determination is required to be made shall begin at the time a claim is filed in accordance with the reasonable procedures of a plan, without regard to whether all the information necessary to make a benefit determination accompanies the filing. In the event that a period of time is extended as permitted pursuant to paragraph (f)(2)(iii) or (f)(3) of this section due to a claimant's failure to submit information necessary to decide a claim, the period for making the benefit determination shall be tolled from the date on which the notification of the extension is sent to the claimant until the date on which the claimant responds to the request for additional information.

(g) Manner and content of notification of benefit determination.

(1) Except as provided in paragraph (g)(2) of this section, the plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination. Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b-1(c)(1)(i), (iii), and (iv). The notification shall set forth, in a manner calculated to be understood by the claimant --

(i) The specific reason or reasons for the adverse determination;

(ii) Reference to the specific plan provisions on which the determination is based;

(iii)A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;

(iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review;

(v) In the case of an adverse benefit determination by a group health plan or a plan providing disability benefits,

(A) If an internal rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination, either the specific rule, guideline, protocol, or other similar criterion; or a statement that such a rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination and that a copy of such rule, guideline, protocol, or other criterion will be provided free of charge to the claimant upon request; or

(B) If the adverse benefit determination is based on a medical necessity or experimental treatment or similar exclusion or limit, either an explanation of the scientific or clinical judgment for the determination, applying the terms of the plan to the claimant's medical circumstances, or a statement that such explanation will be provided free of charge upon request.

(vi) In the case of an adverse benefit determination by a group health plan concerning a claim involving urgent care, a description of the expedited review process applicable to such claims.

(2) In the case of an adverse benefit determination by a group health plan concerning a claim involving urgent care, the information described in paragraph (g)(1) of this section may be provided to the claimant orally within the time frame prescribed in paragraph (f)(2)(i) of this section, provided that a written or electronic notification in accordance with paragraph (g)(1) of this section is furnished to the claimant not later than 3 days after the oral notification.

(h) Appeal of adverse benefit determinations.

(1) In general. Every employee benefit plan shall establish and maintain a procedure by which a claimant shall have a reasonable opportunity to appeal an adverse benefit determination to an appropriate named fiduciary of the plan, and under which there will be a full and fair review of the claim and the adverse benefit determination.

(2) Full and fair review. Except as provided in paragraphs (h)(3) and (h)(4) of this section, the claims procedures of a plan will not be deemed to provide a claimant with a reasonable opportunity for a full and fair review of a claim and adverse benefit determination unless the claims procedures--

(i) Provide claimants at least 60 days following receipt of a notification of an adverse benefit determination within which to appeal the determination;

(ii) Provide claimants the opportunity to submit written comments, documents, records, and other information relating to the claim for benefits;

(iii)Provide that a claimant shall be provided, upon request and free of charge, reasonable access to,

and copies of, all documents, records, and other information relevant to the claimant's claim for benefits. Whether a document, record, or other information is relevant to a claim for benefits shall be determined by reference to paragraph (m)(8) of this section;

(iv) Provide for a review that takes into account all comments, documents, records, and other information submitted by the claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination.

(3) Group health plans. The claims procedures of a group health plan will not be deemed to provide a claimant with a reasonable opportunity for a full and fair review of a claim and adverse benefit determination unless, in addition to complying with the requirements of paragraphs (h)(2)(ii) through (iv) of this section, the claims procedures--

(i) Provide claimants at least 180 days following receipt of a notification of an adverse benefit determination within which to appeal the determination;

(ii) Provide for a review that does not afford deference to the initial adverse benefit determination and that is conducted by an appropriate named fiduciary of the plan who is neither the individual who made the adverse benefit determination that is the subject of the appeal, nor the subordinate of such individual;

(iii) Provide that, in deciding an appeal of any adverse benefit determination that is based in whole or in

part on a medical judgment, including determinations with regard to whether a particular treatment, drug, or other item is experimental, investigational, or not medically necessary or appropriate, the appropriate named fiduciary shall consult with a health care professional who has appropriate training and experience in the field of medicine involved in the medical judgment;

(iv) Provide for the identification of medical or vocational experts whose advice was obtained on behalf of the plan in connection with a claimant's adverse benefit determination, without regard to whether the advice was relied upon in making the benefit determination;

(v) Provide that the health care professional engaged for purposes of a consultation under paragraph (h)(3)(iii) of this section shall be an individual who is neither an individual who was consulted in connection with the adverse benefit determination that is the subject of the appeal, nor the subordinate of any such individual; and

(vi) Provide, in the case of a claim involving urgent care, for an expedited review process pursuant to which--

(A) A request for an expedited appeal of an adverse benefit determination may be submitted orally or in writing by the claimant; and

(B) All necessary information, including the plan's benefit determination on review, shall be transmitted between the plan and the claimant

by telephone, facsimile, or other available similarly expeditious method.

(4) Plans providing disability benefits. The claims procedures of a plan providing disability benefits will not, with respect to claims for such benefits, be deemed to provide a claimant with a reasonable opportunity for a full and fair review of a claim and adverse benefit determination unless the claims procedures comply with the requirements of paragraphs (h)(2)(ii) through (iv) and (h)(3)(i) through (v) of this section.

(i) Timing of notification of benefit determination on review.

(1) In general.

(i) Except as provided in paragraphs (i)(1)(ii), (i)(2), and (i)(3) of this section, the plan administrator shall notify a claimant in accordance with paragraph (j) of this section of the plan's benefit determination on review within a reasonable period of time, but not later than 60 days after receipt of the claimant's request for review by the plan, unless the plan administrator determines that special circumstances (such as the need to hold a hearing, if the plan's procedures provide for a hearing) require an extension of time for processing the claim. If the plan administrator determines that an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 60-day period. In no event shall such extension exceed a period of 60 days from the end of the initial period. The

extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the determination on review.

(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary that holds regularly scheduled meetings at least quarterly, paragraph (i)(1)(i) of this section shall not apply, and, except as provided in paragraphs (i)(2) and (i)(3) of this section, the appropriate named fiduciary shall instead make a benefit determination no later than the date of the meeting of the committee or board that immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a benefit determination may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan's procedures provide for a hearing) require a further extension of time for processing, a benefit determination shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review. If such an extension of time for review is required because of special circumstances, the plan administrator shall provide the claimant with written notice of the extension, describing the special circumstances and the date as of which the benefit determination will be made, prior to the commencement of the extension. The plan

administrator shall notify the claimant, in accordance with paragraph (j) of this section, of the benefit determination as soon as possible, but not later than 5 days after the benefit determination is made.

(2) Group health plans. In the case of a group health plan, the plan administrator shall notify a claimant of the plan's benefit determination on review in accordance with paragraphs (i)(2)(i) through (iii), as appropriate.

(i) Urgent care claims. In the case of a claim involving urgent care, the plan administrator shall notify the claimant, in accordance with paragraph (j) of this section, of the plan's benefit determination on review as soon as possible, taking into account the medical exigencies, but not later than 72 hours after receipt of the claimant's request for review of an adverse benefit determination by the plan.

(ii) Pre-service claims. In the case of a pre-service claim, the plan administrator shall notify the claimant, in accordance with paragraph (j) of this section, of the plan's benefit determination on review within a reasonable period of time appropriate to the medical circumstances. In the case of a group health plan that provides for one appeal of an adverse benefit determination, such notification shall be provided not later than 30 days after receipt by the plan of the claimant's request for review of an adverse benefit determination. In the case of a group health plan that provides for two appeals of an adverse determination, such notification shall be provided, with respect to any one of such two appeals, not

later than 15 days after receipt by the plan of the claimant's request for review of the adverse determination.

(iii) Post-service claims.

(A) In the case of a post-service claim, except as provided in paragraph (i)(2)(iii)(B) of this section, the plan administrator shall notify the claimant, in accordance with paragraph (j) of this section, of the plan's benefit determination on review within a reasonable period of time. In the case of a group health plan that provides for one appeal of an adverse benefit determination, such notification shall be provided not later than 60 days after receipt by the plan of the claimant's request for review of an adverse benefit determination. In the case of a group health plan that provides for two appeals of an adverse determination, such notification shall be provided, with respect to any one of such two appeals, not later than 30 days after receipt by the plan of the claimant's request for review of the adverse determination.

(B) In the case of a multiemployer plan with a committee or board of trustees designated as the appropriate named fiduciary that holds regularly scheduled meetings at least quarterly, paragraph (i)(2)(iii)(A) of this section shall not apply, and the appropriate named fiduciary shall instead make a benefit determination no later than the date of the meeting of the committee or board that immediately follows the plan's receipt of a

request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a benefit determination may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan's procedures provide for a hearing) require a further extension of time for processing, a benefit determination shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review. If such an extension of time for review is required because of special circumstances, the plan administrator shall notify the claimant in writing of the extension, describing the special circumstances and the date as of which the benefit determination will be made, prior to the commencement of the extension. The plan administrator shall notify the claimant, in accordance with paragraph (j) of this section, of the benefit determination as soon as possible, but not later than 5 days after the benefit determination is made.

(3) Disability claims.

(i) Except as provided in paragraph (i)(3)(ii) of this section, claims involving disability benefits (whether the plan provides for one or two appeals) shall be governed by paragraph (i)(1) of this section, except that a period of 45 days shall apply instead of 60 days for purposes of that paragraph.

(ii) In the case of a multiemployer plan with a committee or board of trustees designated as the appropriate named fiduciary that holds regularly scheduled meetings at least quarterly, paragraph (i)(3)(i) of this section shall not apply, and the appropriate named fiduciary shall instead make a benefit determination no later than the date of the meeting of the committee or board that immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a benefit determination may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan's procedures provide for a hearing) require a further extension of time for processing, a benefit determination shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review. If such an extension of time for review is required because of special circumstances, the plan administrator shall notify the claimant in writing of the extension, describing the special circumstances and the date as of which the benefit determination will be made, prior to the commencement of the extension. The plan administrator shall notify the claimant, in accordance with paragraph (j) of this section, of the benefit determination as soon as possible, but not later than 5 days after the benefit determination is made.

(4) Calculating time periods. For purposes of paragraph (i) of this section, the period of time within which a benefit determination on review is required to be made shall begin at the time an appeal is filed in accordance with the reasonable procedures of a plan, without regard to whether all the information necessary to make a benefit determination on review accompanies the filing. In the event that a period of time is extended as permitted pursuant to paragraph (i)(1), (i)(2)(iii)(B), or (i)(3) of this section due to a claimant's failure to submit information necessary to decide a claim, the period for making the benefit determination on review shall be tolled from the date on which the notification of the extension is sent to the claimant until the date on which the claimant responds to the request for additional information.

(5) Furnishing documents. In the case of an adverse benefit determination on review, the plan administrator shall provide such access to, and copies of, documents, records, and other information described in paragraphs (j)(3), (j)(4), and (j)(5) of this section as is appropriate.

(j) Manner and content of notification of benefit determination on review. The plan administrator shall provide a claimant with written or electronic notification of a plan's benefit determination on review. Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b-1(c)(1)(i), (iii), and (iv). In the case of an adverse benefit determination, the notification shall set forth, in a manner calculated to be understood by the claimant--

(1) The specific reason or reasons for the adverse determination;

(2) Reference to the specific plan provisions on which the benefit determination is based;

(3) A statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's claim for benefits. Whether a document, record, or other information is relevant to a claim for benefits shall be determined by reference to paragraph (m)(8) of this section;

(4) A statement describing any voluntary appeal procedures offered by the plan and the claimant's right to obtain the information about such procedures described in paragraph (c)(3)(iv) of this section, and a statement of the claimant's right to bring an action under section 502(a) of the Act; and

(5) In the case of a group health plan or a plan providing disability benefits--

(i) If an internal rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination, either the specific rule, guideline, protocol, or other similar criterion; or a statement that such rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the claimant upon request;

(ii) If the adverse benefit determination is based on a medical necessity or experimental treatment or similar exclusion or limit, either an explanation of the scientific or clinical judgment for the

determination, applying the terms of the plan to the claimant's medical circumstances, or a statement that such explanation will be provided free of charge upon request; and

(iii) The following statement: "You and your plan may have other voluntary alternative dispute resolution options, such as mediation. One way to find out what may be available is to contact your local U.S. Department of Labor Office and your State insurance regulatory agency."

(k) Preemption of State law.

(1) Nothing in this section shall be construed to supersede any provision of State law that regulates insurance, except to the extent that such law prevents the application of a requirement of this section.

(2) (i) For purposes of paragraph (k)(1) of this section, a State law regulating insurance shall not be considered to prevent the application of a requirement of this section merely because such State law establishes a review procedure to evaluate and resolve disputes involving adverse benefit determinations under group health plans so long as the review procedure is conducted by a person or entity other than the insurer, the plan, plan fiduciaries, the employer, or any employee or agent of any of the foregoing.

(ii) The State law procedures described in paragraph (k)(2)(i) of this section are not part of the full and fair review required by section **503** of the Act. Claimants therefore need not exhaust such State law procedures prior to bringing suit under section 502(a) of the Act.

(l) Failure to establish and follow reasonable claims procedures. In the case of the failure of a plan to establish or follow claims procedures consistent with the requirements of this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim.

(m) Definitions. The following terms shall have the meaning ascribed to such terms in this paragraph (m) whenever such term is used in this section:

(1) (i) A "claim involving urgent care" is any claim for medical care or treatment with respect to which the application of the time periods for making non-urgent care determinations--

(A) Could seriously jeopardize the life or health of the claimant or the ability of the claimant to regain maximum function, or,

(B) In the opinion of a physician with knowledge of the claimant's medical condition, would subject the claimant to severe pain that cannot be adequately managed without the care or treatment that is the subject of the claim.

(ii) Except as provided in paragraph (m)(1)(iii) of this section, whether a claim is a "claim involving urgent care" within the meaning of paragraph (m)(1)(i)(A) of this section is to be determined by an individual acting on behalf of the plan applying the judgment of a prudent layperson who

possesses an average knowledge of health and medicine.

(iii)Any claim that a physician with knowledge of the claimant's medical condition determines is a "claim involving urgent care" within the meaning of paragraph (m)(1)(i) of this section shall be treated as a "claim involving urgent care" for purposes of this section.

(2) The term "pre-service claim" means any claim for a benefit under a group health plan with respect to which the terms of the plan condition receipt of the benefit, in whole or in part, on approval of the benefit in advance of obtaining medical care.

(3) The term ``post-service claim'' means any claim for a benefit under a group health plan that is not a pre-service claim within the meaning of paragraph (m)(2) of this section.

(4) The term ``adverse benefit determination'' means any of the following: a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit, including any such denial, reduction, termination, or failure to provide or make payment that is based on a determination of a participant's or beneficiary's eligibility to participate in a plan, and including, with respect to group health plans, a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit resulting from the application of any utilization review, as well as a failure to cover an item or service for which benefits are otherwise provided because it is determined to be experimental

or investigational or not medically necessary or appropriate.

(5) The term "notice" or ``notification" means the delivery or furnishing of information to an individual in a manner that satisfies the standards of 29 CFR 2520.104b-1(b) as appropriate with respect to material required to be furnished or made available to an individual.

(6) The term ``group health plan" means an employee welfare benefit plan within the meaning of section 3(1) of the Act to the extent that such plan provides ``medical care" within the meaning of section 733(a) of the Act.

(7) The term ``health care professional" means a physician or other health care professional licensed, accredited, or certified to perform specified health services consistent with State law.

(8) A document, record, or other information shall be considered "relevant" to a claimant's claim if such document, record, or other information

(i) Was relied upon in making the benefit determination;

(ii) Was submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination;

(iii)Demonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination; or

(iv) In the case of a group health plan or a plan providing disability benefits, constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination.

(n) Apprenticeship plans. This section does not apply to employee benefit plans that solely provide apprenticeship training benefits.

(o) Applicability dates.

(1) Except as provided in paragraph (o)(2) of this section, this section shall apply to claims filed under a plan on or after January 1, 2002.

(2) This section shall apply to claims filed under a group health plan on or after the first day of the first plan year beginning on or after July 1, 2002, but in no event later than January 1, 2003.

UNITED STATE CODE
(Office of the Law Revision Counsel)

28 USC §1291

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE

CHAPTER 83 – COURTS OF APPEALS

-HEAD-

Sec. 1291. Final Decisions of District Courts

-STATUTE-

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

-SOURCE-

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 55, Sec. 48, 65 Stat. 726; Pub. L. 85-508, Sec. 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97-164, title I, Sec. 124, Apr. 2, 1982, 96 Stat. 36.)

HISTORICAL AND REVISION NOTES

... The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." ...

28 USC §1292

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE

CHAPTER 83 – COURTS OF APPEALS

-HEAD-

Sec. 1292. Interlocutory Decisions

-STATUTE-

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling

question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

...

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

-SOURCE-

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, Sec. 49, 65 Stat. 726; Pub. L. 85-508, Sec. 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 85-919, Sept. 2, 1958, 72 Stat. 1770; Pub. L. 97-164, Sec. 125, Apr. 2, 1982, 96 Stat. 36; Pub. L. 98-620, title IV, Sec. 412, Nov. 8, 1984, 98 Stat. 3362; Pub. L. 100-702, title V, Sec. 501, Nov. 19, 1988, 102 Stat. 4652; Pub. L. 102-572, title I, Sec. 101, title IX, Secs. 902(b), 906(c), Oct. 29, 1992, 106 Stat. 4506, 4516, 4518.)

HISTORICAL AND REVISION NOTES

... The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States."...

28 USC 1331

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE

CHAPTER 85 – DISTRICT COURTS; JURISDICTION

-HEAD-

Sec. 1331. Federal Question

-STATUTE-

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

-SOURCE-

(June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85-554, Sec. 1, July 25, 1958, 72 Stat. 415; Pub. L. 94-574, Sec. 2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96-486, Sec. 2(a), Dec. 1, 1980, 94 Stat. 2369.)

-MISC1-

HISTORICAL AND REVISION NOTES

...Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy...

28 USC §1367

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE

CHAPTER 85 – DISTRICT COURTS; JURISDICTION

-HEAD-

Sec. 1367. Supplemental Jurisdiction

-STATUTE-

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if–

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

-SOURCE-

(Added Pub. L. 101-650, title III, Sec. 310(a), Dec. 1, 1990, 104 Stat. 5113.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (b), are set out in the Appendix to this title

28 USC §1343

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART IV – JURISDICTION AND VENUE

CHAPTER 85 – DISTRICT COURTS; JURISDICTION

-HEAD-

Sec. 1343. Civil Rights and Elective Franchise

-STATUTE-

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section –

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

-SOURCE-

(June 25, 1948, ch. 646, 62 Stat. 932; Sept. 3, 1954, ch. 1263, Sec. 42, 68 Stat. 1241; Pub. L. 85-315, part III, Sec. 121, Sept. 9, 1957, 71 Stat. 637; Pub. L. 96-170, Sec. 2, Dec. 29, 1979, 93 Stat. 1284.)

EFFECTIVE DATE OF 1979 AMENDMENT

Section 3 of Pub. L. 96-170 provided that: "The amendments made by this Act [amending this section and section 1983 of Title 42, The Public Health and Welfare] shall apply with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after the date of the enactment of this Act [Dec. 29, 1979]."

28 USC §2072

TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

PART V – PROCEDURE

CHAPTER 131 – RULES OF COURTS

-HEAD-

Sec. 2072. Rules of Procedure and Evidence; Power to Prescribe

-STATUTE-

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

-SOURCE-

(Added Pub. L. 100-702, title IV, Sec. 401(a), Nov. 19, 1988, 102 Stat. 4648; amended Pub. L. 101-650, title III, Secs. 315, 321, Dec. 1, 1990, 104 Stat. 5115, 5117.).

28 USCA Rule 4

TITLE 28 – APPENDIX

FEDERAL RULES OF APPELLATE PROCEDURE

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

-HEAD-

Rule 4. Appeal as of Right - When Taken

-STATUTE-

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal – in compliance with Rule 3(c) - within the time prescribed by this Rule measured from the

entry of the order disposing of the last such remaining motion. –

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after

the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

-SOURCE-

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub. L. 100-690, title VII, Sec. 7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

COMMITTEE NOTES ON RULES - 2002 AMENDMENT

Subdivision (a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error coram nobis is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases).Compare United States v. Craig, 907 F.2d 653, 655-57, amended 919 F.2d 57 (7th Cir. 1990); United States v. Cooper, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); with Yasui v. United States, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and United States v. Mills, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. Sec. 2255, the Supreme Court has recognized the continued availability of a writ of error coram nobis in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error coram nobis to set aside the conviction. United States v. Morgan, 346 U.S. 502 (1954).

As the Court recognized, in the Morgan situation an application for a writ of error coram nobis "is of the same general character as [a motion] under 28 U.S.C. Sec. 2255." Id. at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. Sec. 2255, should also apply when a district court grants or denies a writ of error coram nobis. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the Morgan situation, as the party seeking the writ of error coram nobis has already served his or her full sentence.

Notwithstanding Morgan, it is not clear whether the Supreme Court continues to believe that the writ of error coram nobis is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" Carlisle v. United States, 517 U.S. 416, 429 (1996) (quoting United States v. Smith, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error coram nobis. Litigants may bring and label as applications for a writ of error coram nobis what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. See Pontarelli v. Stone,

930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. See 16A Charles Alan Wright, et al., Federal Practice and Procedure Sec. 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a criminal case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or during the 30 days following the expiration of the original deadline.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The good cause and excusable neglect standards have "different domains." Lorenzen v. Employees Retirement

Plan, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault - excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a

judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document,

then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which post-judgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. See Fed. R. Civ. P. 58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). See Rule 4(a)(7)(A)(1).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order - or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59 - ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. See Fiore v. Washington County Community Mental Health Ctr., 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. See, e.g., United States v. Haynes, 158 F.3d 1327, 1331 (D.C. Cir. 1998); Hammack v. Baroid Corp., 142 F.3d 266, 269-70 (5th Cir. 1998); Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), vacated on other grounds, 143 F.3d 263 (6th Cir.

1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a post-judgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split - this split addressed only by the amendment to Rule 4(a)(7) - concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In Bankers Trust Co. v. Mallis, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. Sec. 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. Id. Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document

requirement. Some circuits permit appellees to object to attempted Mallis waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. See, e.g., Selletti v. Carey, 173 F.3d 104, 109-10 (2d Cir. 1999); Williams v. Borg, 139 F.3d 737, 739-40 (9th Cir. 1998); Silver Star Enters., Inc. v. M/V Saramacca, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit Mallis waivers even if the appellee objects. See, e.g., Haynes, 158 F.3d at 1331; Miller v. Artistic Cleaners, 153 F.3d 781, 783-84 (7th Cir. 1998); Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in Mallis and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In Townsend v. Lucas, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. Sec. 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10,

1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within 30 days. Id. at 934. Several other cases have embraced the Townsend approach. See, e.g., Armstrong v. Ahitow, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); Hughes v. Halifax County Sch. Bd., 823 F.2d 832, 835-36 (4th Cir. 1987); Harris v. McCarthy, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. See, e.g., Haynes, 158 F.3d at 1330-31; Clough v. Rush, 959 F.2d 182, 186 (10th Cir. 1992); McCalden v. California Library Ass'n, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in Townsend was "precisely the purposeless spinning of wheels abjured by the Court in the [Mallis] case." 15B Charles Alan Wright et al., Federal Practice and Procedure Sec. 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the Townsend approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of Townsend.

Changes Made After Publication and Comments. No changes were made to the text of proposed Rule 4(a)(7)(B) or to the third or fourth numbered sections of the Committee

Note, except that, in several places, references to a judgment being "entered" on a separate document were changed to references to a judgment being "set forth" on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules consistently refer to "entering" judgments on the civil docket and to "setting forth" judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A) – one substantive and one stylistic. The substantive change was to increase the "cap" from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. See Rule 4(a)(6)(A). It hardly seems fair to give a party who does receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need some limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of time to appeal. Sending appellate lawyers to the civil rules to discover when time began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when . . ."

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the appellate rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain civil rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: "Judgment is entered for purposes of these Rules when . . . ." In addition, Rule 4(a)(7)(A) was redrafted [A redraft of Rule 4(a)(7) was faxed to members of the Appellate Rules Committee two weeks after our meeting in New Orleans. The Committee consented to the redraft

without objection.] so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In substance, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap – a change that was suggested by some of the commentators and that makes the cap more forgiving. ...

28 USCA Rule 18

TITLE 28 – APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

IV. PARTIES

-HEAD-

Rule 18. Joinder of Claims and Remedies

-STATUTE-

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances.

Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.

-SOURCE-

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES – 1937

Note to Subdivision (a).

1. Recent development, both in code and common law states, has been toward unlimited joinder of actions. See Ill.Rev.Stat. (1937) ch. 110, Sec. 168; N.J.S.A. 2:27-37, as modified by N.J.Sup.Ct.Rules, Rule 21, 2 N.J.Misc. 1208

(1924); N.Y.C.P.A. (1937) Sec. 258 as amended by Laws of 1935, ch. 339.

2. This provision for joinder of actions has been patterned upon [former] Equity Rule 26 (Joinder of Causes of Action) and broadened to include multiple parties. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 18, r.r. 1-9 (noting rules 1 and 6). The earlier American codes set forth classes of joinder, following the now abandoned New York rule. See N.Y.C.P.A. Sec. 258 before amended in 1935; Compare Kan.Gen.Stat.Ann. (1935) Sec. 60-601; Wis.Stat. (1935) Sec. 263.04 for the more liberal practice.

3. The provisions of this rule for the joinder of claims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For the jurisdictional aspects of joinder of claims, see Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936), 45 Yale L.J. 393, 397-410. For separate trials of joined claims, see Rule 42(b).

Note to Subdivision (b). This rule is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in [former] Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.). In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner (Braun v. American Laundry Mach. Co., 56 F.(2d) 197 (S.D.N.Y. 1932)) to conform to the provisions of the Uniform Fraudulent Conveyance Act, Secs. 9 and 10. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 444 (1933).

NOTES OF ADVISORY COMMITTEE ON RULES – 1966 AMENDMENT

The Rules "proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common." Sunderland, The New Federal Rules, 45 W.Va.L.Q. 5, 13 (1938); see Clark, Code Pleading 58 (2d ed. 1947). Accordingly, Rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21.

The liberal policy regarding joinder of claims in the pleadings extends to cases with multiple parties. However, the language used in the second sentence of Rule 18(a) – "if the requirements of Rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied" – has led some courts to infer that the rules regulating joinder of parties are intended to carry back to Rule 18(a) and to impose some special limits on joinder of claims in multiparty cases. In particular, Rule 20(a) has been read as restricting the operation of Rule 18(a) in certain situations in which a number of parties have been permissively joined in an action. In Federal Housing Admr. v. Christianson, 26 F.Supp. 419 (D.Conn. 1939), the indorsee of two notes sued the three comakers of one note, and sought to join in the action a count on a second note which had been made by two of the three defendants. There was no doubt about the propriety of the joinder of the three parties defendant, for a right to relief was being asserted against all three defendants which arose out of a single "transaction" (the first note) and a question of fact or law "common" to all three defendants would arise in the action. See the text of

Rule 20(a). The court, however, refused to allow the joinder of the count on the second note, on the ground that this right to relief, assumed to arise from a distinct transaction, did not involve a question common to all the defendants but only two of them. For analysis of the Christianson case and other authorities, see 2 Barron & Holtzoff, Federal Practice & Procedure, Sec. 533.1 (Wright ed. 1961); 3 Moore's Federal Practice, par. 18.04[3] (2d ed. 1963).

If the court's view is followed, it becomes necessary to enter at the pleading stage into speculations about the exact relation between the claim sought to be joined against fewer than all the defendants properly joined in the action, and the claims asserted against all the defendants. Cf. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn.L.Rev. 580, 605-06 (1952). Thus if it could be found in the Christianson situation that the claim on the second note arose out of the same transaction as the claim on the first or out of a transaction forming part of a "series," and that any question of fact or law with respect to the second note also arose with regard to the first, it would be held that the claim on the second note could be joined in the complaint. See 2 Barron & Holtzoff, supra, at 199; see also id. at 198 n. 60.4; cf. 3 Moore's Federal Practice, supra, at 1811. Such pleading niceties provide a basis for delaying and wasteful maneuver. It is more compatible with the design of the Rules to allow the claim to be joined in the pleading, leaving the question of possible separate trial of that claim to be later decided. See 2 Barron & Holtzoff, supra, Sec. 533.1; Wright, supra, 36 Minn.L.Rev. at 604-11; Developments in the Law - Multiparty Litigation in the Federal Courts, 71 Harv. 874, 970-71 (1958); Commentary, Relation Between Joinder of Parties and Joinder of Claims, 5 F.R.Serv. 822 (1942). It is instructive to note that the court in the Christianson case,

while holding that the claim on the second note could not be joined as a matter of pleading, held open the possibility that both claims would later be consolidated for trial under Rule 42(a). See 26 F.Supp. 419.

Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority, but also to state clearly as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. See Noland Co., Inc. v. Graver Tank & Mfg. Co., 301 F.2d 43, 49-51 (4th Cir. 1962); but cf. C. W. Humphrey Co. v. Security Alum. Co., 3 F.R.D. 41 (E.D.Mich. 1962) This permitted joinder of claims is not affected by the fact that there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claim if fairness or convenience justifies separate treatment.

Amended Rule 18(a), like the rule prior to amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading. See Rule 82.

See also the amendment of Rule 20(a) and the Advisory Committee's Note thereto.

Free joinder of claims and remedies is one of the basic purposes of unification of the admiralty and civil procedure. The amendment accordingly provides for the inclusion in the rule of maritime claims as well as those which are legal and equitable in character.

28 USCA Rule 54

TITLE 28 – APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

VII. JUDGMENT

-HEAD-

Rule 54. Judgments; Costs

-STATUTE-

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every

final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs; Attorneys' Fees

(1) Costs Other than Attorneys' Fees. Except when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees...

-SOURCE-

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES - 1946 AMENDMENT

The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. Hohorst v. Hamburg-American Packet Co. (1893) 148 U.S. 262; Rexford v. Brunswick-Balke-Collender Co. (1913) 228 U.S. 339; Collins v. Miller (1920) 252 U.S. 364. Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly

created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in Catlin v. United States (1945) 324 U.S. 229. See also United States v. Florian (1941) 312 U.S. 656, rev'g (and restoring the first opinion in) Florian v. United States (C.C.A.7th, 1940) 114 F.(2d) 990; Reeves v. Beardall (1942) 316 U.S. 283.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appellant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases: Atwater v. North American Coal Corp. (C.C.A.2d, 1940) 111 F.(2d) 125; Rosenblum v. Dingfelder (C.C.A.2d, 1940) 111 F.(2d) 406; Audi-Vision, Inc. v. RCA Mfg. Co., Inc. (C.C.A.2d, 1943) 136 F.(2d) 621; Zalkind v. Scheinman (C.C.A.2d, 1943) 139 F.(2d) 895; Oppenheimer v. F. J. Young & Co., Inc. (C.C.A.2d, 1944) 144 F.(2d) 387; Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp. (C.C.A.2d, 1946) 154 F.(2d) 814, cert. den. (1946) 66 S.Ct. 1353; Zarati Steamship Co. v. Park Bridge Corp. (C.C.A.2d,

1946) 154 F.(2d) 377; Baltimore and Ohio R. Co. v. United Fuel Gas Co. (C.C.A.4th, 1946) 154 F.(2d) 545; Jefferson Electric Co. v. Sola Electric Co. (C.C.A.7th, 1941) 122 F.(2d) 124; Leonard v. Socony-Vacuum Oil Co. (C.C.A.7th, 1942) 130 F.(2d) 535; Markham v. Kasper (C.C.A.7th, 1945) 152 F.(2d) 270; Hanney v. Franklin Fire Ins. Co. of Philadelphia (C.C.A.9th, 1944) 142 F.(2d) 864; Toomey v. Toomey (App.D.C. 1945) 149 F.(2d) 19.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But cf. Circuit Judge Frank's dissenting opinion in Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., supra, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54(b), see amended Rule 62(h).

28 USCA Rule 58

TITLE 28 – APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

VII. JUDGMENT

-HEAD-

Rule 58. Entry of Judgment

-STATUTE-

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

-SOURCE-

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES - 1963 AMENDMENT

...Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for postverdict motions and for the purpose of appeal. See id.; and compare Blanchard v. Commonwealth Oil Co., 294 F.2d 834 (5th Cir. 1961); United States v. Higginson, 238 F.2d 439 (1st Cir. 1956); Danzig v. Virgin Isle Hotel, Inc., 278 F.2d 580 (3d Cir. 1960); Sears v. Austin, 282 F.2d 340 (9th Cir. 1960), with Matteson v. United States, supra; Erstling v. Southern Bell Tel. & Tel. Co., 255 F.2d 93 (5th Cir. 1958); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); Beacon Fed. S. & L. Assn. v. Federal Home L. Bank Bd., 266 F.2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); Ram v. Paramount Film D. Corp., 278 F.2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate

document - distinct from any opinion or memorandum - which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U.S. District Courts for the Eastern and Southern Districts of New York; Ram v. Paramount Film D. Corp., supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b)(1) and (2) covering the subject of judgments by default.

COMMITTEE NOTES ON RULES - 2002 AMENDMENT

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a

separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58 is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document. And if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision that defines the time when judgment is entered. If judgment

is promptly set forth on a separate document, as should be done when required by Rule 58(a)(1), the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

The new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered. If the 150-day provision in Rule 58(b)(2)(B) - designed to integrate the time for post-judgment motions with appeal time - serves no purpose, or would defeat the purpose of another rule, it should be disregarded. In theory, for example, the separate document requirement continues to apply to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document - there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is

set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 150 days after entry in the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, Sec. 2786. The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Changes Made After Publication and Comments. Minor style changes were made. The definition of the time of entering judgment in Rule 58(b) was extended to reach all Civil Rules, not only the Rules described in the published version - Rules 50, 52, 54(d)(2)(B), 59, 60, and 62. And the time of entry was extended from 60 days to 150 days after entry in the civil docket without a required separate document.

28 USCA Rule 59

TITLE 28 – APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

VII. JUDGMENT

-HEAD-

Rule 59. New Trials; Amendment of Judgments

-STATUTE-

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues

(1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and

(2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

-SOURCE-

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Apr. 27, 1995, eff. Dec. 1, 1995.)

28 USCA Rule 60

TITLE 28 – APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

VII. JUDGMENT

-HEAD-

Rule 60. Relief from Judgment or Order

-STATUTE-

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

-SOURCE-

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

28 USCA Rule 62

TITLE 28 – APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

VII. JUDGMENT

-HEAD-

Rule 62. Stay of Proceedings To Enforce a Judgment

-STATUTE-

(a) Automatic Stay; Exceptions – Injunctions, Receiverships, and Patent Accountings.

Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on Motion for New Trial or for Judgment.

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the

findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction Pending Appeal.

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except

(1) by such court sitting in open court or

(2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) Stay Upon Appeal.

When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the United States or Agency Thereof.

When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay According to State Law.

In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

(g) Power of Appellate Court Not Limited.

The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of Judgment as to Multiple Claims or Multiple Parties.

When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

-SOURCE-

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987.)

28 USCA Rule 79

TITLE 28 – APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

X. DISTRICT COURTS AND CLERKS

-HEAD-

Rule 79. Books and Records Kept by the Clerk and Entries Therein

-STATUTE-

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a

correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

...

-SOURCE-

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES - 1963 AMENDMENT

The terminology is clarified without any change of the prescribed practice. See amended Rule 58, and the Advisory Committee's Note thereto.

29 USC §1001

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle A – General Provisions

-HEAD-

Sec. 1001. Congressional Findings and Declaration of Policy

-STATUTE-

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in

the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for

fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

-SOURCE-

(Pub. L. 93-406, title I, Sec. 2, Sept. 2, 1974, 88 Stat. 832.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b) and (c), was in the original "this Act", meaning Pub. L. 93-406, known as the Employee Retirement Income Security Act of 1974. Titles I, III, and IV of such Act are classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

29 USC §1022

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle B – Regulatory Provisions

Part 1 – Reporting and Disclosure

-HEAD-

Sec. 1022. Summary Plan Description

-STATUTE-

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and

address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

-SOURCE-

(Pub. L. 93-406, title I, Sec. 102, Sept. 2, 1974, 88 Stat. 841; Pub. L. 104-191, title I, Sec. 101(c)(2), Aug. 21, 1996, 110 Stat. 1951; Pub. L. 104-204, title VI, Sec. 603(b)(3)(C), Sept. 26, 1996, 110 Stat. 2938; Pub. L. 105-34, title XV, Sec. 1503(b), Aug. 5, 1997, 111 Stat. 1061.)

29 USC §1024

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle B – Regulatory Provisions

Part 1 – Reporting and Disclosure

-HEAD-

Sec. 1024. Filing and Furnishing of Information

-STATUTE-

(a) Filing of annual report with Secretary

(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing). The Secretary shall make copies of such annual reports available for inspection in the public document room of the Department of Labor.

(2) (A) With respect to annual reports required to be filed with the Secretary under this part, he may by regulation prescribe simplified annual reports for any pension plan which covers less than 100 participants.

(B) Nothing contained in this paragraph shall preclude the Secretary from requiring any information or data from any such plan to which this part applies where he finds such data or information is necessary to carry out the purposes of this

subchapter nor shall the Secretary be precluded from revoking provisions for simplified reports for any such plan if he finds it necessary to do so in order to carry out the objectives of this subchapter.

(3) The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this subchapter, or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans.

(4) The Secretary may reject any filing under this section-

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 1023(a)(3)(A) or section 1023(a)(4)(B) of this title.

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions –

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

(6) The administrator of any employee benefit plan subject to this part shall furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to, the latest summary plan description (including any summaries of plan changes not contained in the summary plan description), and the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all

modifications and changes referred to in section 1022(a) of this title –

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a) of this title (other than a material reduction in covered services or benefits provided in the case of a group health plan (as defined in section 1191b(a)(1) of this title)), a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan. If there is a modification or change described in section

1022(a) of this title that is a material reduction in covered services or benefits provided under a group health plan (as defined in section 1191b(a)(1) of this title), a summary description of such modification or change shall be furnished to participants and beneficiaries not later than 60 days after the date of the adoption of the modification or change. In the alternative, the plan sponsors may provide such description at regular intervals of not more than 90 days. The Secretary shall issue regulations within 180 days after August 21, 1996, providing alternative mechanisms to delivery by mail through which group health plans (as so defined) may notify participants and beneficiaries of material reductions in covered services or benefits.

(2) The administrator shall make copies of the latest updated summary plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of

this title and such other material (including the percentage determined under section 1023(d)(11) of this title) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary,(!1) plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) Statement of rights

The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this subchapter.

(d) Cross references

For regulations respecting coordination of reports to the Secretaries of Labor and the Treasury, see section 1204 of this title.

-SOURCE-

(Pub. L. 93-406, title I, Sec. 104, Sept. 2, 1974, 88 Stat. 847; Pub. L. 99-272, title XI, Sec. 11016(b)(2), Apr. 7, 1986, 100 Stat. 273; Pub. L. 100-203, title IX, Sec. 9342(a)(2), Dec. 22, 1987, 101 Stat. 1330-371; Pub. L. 101-239, title VII, Sec. 7894(b)(3), (4), Dec. 19, 1989, 103 Stat. 2448; Pub. L. 104-191, title I, Sec. 101(c)(1),

Aug. 21, 1996, 110 Stat. 1951; Pub. L. 104-204, title VI, Sec. 603(b)(3)(D), Sept. 26, 1996, 110 Stat. 2938; Pub. L. 105-34, title XV, Sec. 1503(c)(1), (2)(A), (d)(1)-(3), Aug. 5, 1997, 111 Stat. 1062.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1021, 1022, 1023, 1027, 1029, 1132, 1185 of this title.

-FOOTNOTE-

(!1) So in original. Comma probably should not appear.

29 USC §1025

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEERETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle B – Regulatory Provisions

Part 1 – Reporting and Disclosure

-HEAD-

Sec. 1025. Reporting of participant's benefit rights

-STATUTE-

(a) Statement furnished by administrator to participants and beneficiaries

Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information –

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) One-per-year limit on reports

In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) of this section during any one 12-month period.

(c) Individual statement furnished by administrator to participants setting forth information in administrator's Internal Revenue registration statement and notification of forfeitable benefits

Each administrator required to register under section 6057 of title 26 shall, before the expiration of the time prescribed for such registration, furnish to each participant described in subsection (a)(2)(C) of such section, an individual statement setting forth the information with respect to such participant required to be contained in the registration statement required by section 6057(a)(2) of title 26. Such statement shall also include a notice to the participant of any benefits which are forfeitable if the participant dies before a certain date.

(d) Plans to which more than one unaffiliated employer is required to contribute; regulations

Subsection (a) of this section shall apply to a plan to which more than one unaffiliated employer is required to contribute only to the extent provided in regulations prescribed by the Secretary in coordination with the Secretary of the Treasury

-SOURCE-

(Pub. L. 93-406, title I, Sec. 105, Sept. 2, 1974, 88 Stat. 849; Pub. L. 98-397, title I, Sec. 106, Aug. 23, 1984, 98 Stat. 1436; Pub. L. 101-239, title VII, Secs. 7891(a)(1), 7894(b)(5), Dec. 19, 1989, 103 Stat. 2445, 2448.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1021, 1026, 1132 of this title.

29 USC §1109

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle B – Regulatory Provisions

Part 4 – Fiduciary Responsibility

-HEAD-

Sec. 1109. Liability for Breach of Fiduciary Duty

-STATUTE-

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

-SOURCE-

(Pub. L. 93-406, title I, Sec. 409, Sept. 2, 1974, 88 Stat. 886.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1132 of this title.

29 USC §1131

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle B – Regulatory Provisions

Part 5 – Administration and Enforcement

-HEAD-

Sec. 1131. Criminal Penalties

-STATUTE-

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $100,000 or imprisoned not more than 10 years, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $500,000.

-SOURCE-

(Pub. L. 93-406, title I, Sec. 501, Sept. 2, 1974, 88 Stat. 891; Pub. L. 107-204, title IX, Sec. 904, July 30, 2002, 116 Stat. 805.)

REGULATIONS

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this subchapter call for the promulgation of regulations, see section 1031 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1028 of this title.

29 USC §1132

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle B – Regulatory Provisions

Part 5 – Administration and Enforcement

-HEAD-

Sec. 1132. Civil Enforcement

-STATUTE-

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary

(A) to enjoin any act or practice which violates any provision of this subchapter,

(B) to obtain other appropriate equitable relief

(i) to redress such violation or

(ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title,

(A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or

(B) to obtain appropriate equitable relief

(i) to redress such violation or

(ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan

constitutes a violation of part 4 of this title (!1) or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) (!2) of title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if –

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title).

Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator

(A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 (!2) of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or

(B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) (!2) of this title.

For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary

under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with section 1021(i) of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) (!2) of title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service

upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of –

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of title 26) within 90

days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title

by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

-SOURCE-

(Pub. L. 93-406, title I, Sec. 502, Sept. 2, 1974, 88 Stat. 891; Pub. L. 96-364, title III, Sec. 306(b), Sept. 26, 1980, 94 Stat. 1295; Pub. L. 99-272, title X, Sec. 10002(b), Apr. 7, 1986, 100 Stat. 231; Pub. L. 100-203, title IX, Secs. 9342(c), 9344, Dec. 22, 1987, 101 Stat. 1330-372, 1330-373; Pub. L. 101-239, title II, Sec. 2101(a), (b), title VII, Secs. 7881(b)(5)(B), (j)(2), (3), 7891(a)(1), 7894(f)(1), Dec. 19, 1989, 103 Stat. 2123, 2438, 2442, 2445, 2450; Pub. L. 101-508, title XII, Sec. 12012(d)(2), Nov. 5, 1990, 104 Stat. 1388-573; Pub. L. 103-66, title IV, Sec. 4301(c)(1)-(3), Aug. 10, 1993, 107 Stat. 376; Pub. L. 103-401, Secs. 2, 3, Oct. 22, 1994, 108 Stat. 4172; Pub. L. 103-465, title VII, Sec. 761(a)(9)(B)(ii), Dec. 8, 1994, 108 Stat. 5033; Pub. L. 104-191, title I, Sec. 101(b), (e)(2), Aug. 21, 1996, 110 Stat. 1951, 1952; Pub. L. 104-204, title VI, Sec. 603(b)(3)(E), Sept. 26, 1996, 110 Stat. 2938; Pub. L. 105-34, title XV, Sec. 1503(c)(2)(B), (d)(7), Aug. 5, 1997, 111 Stat. 1062; Pub. L. 107-204, title III, Sec. 306(b)(3), July 30, 2002, 116 Stat. 783.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1101, 1136, 1140 of this title.

-FOOTNOTE-

(!1) So in original. Probably should be "subtitle".

(!2) See References in Text note below.

29 USC §1133

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle B - Regulatory Provisions

Part 5 - Administration and Enforcement

-HEAD-

Sec. 1133. Claims Procedure

-STATUTE-

In accordance with regulations of the Secretary, every employee benefit plan shall –

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

-SOURCE-

(Pub. L. 93-406, title I, Sec. 503, Sept. 2, 1974, 88 Stat. 893.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1022 of this title.

29 USC §1140

TITLE 29 – LABOR

CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle B – Regulatory Provisions

Part 5 – Administration and Enforcement

-HEAD-

Sec. 1140. Interference with Protected Rights

-STATUTE-

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

-SOURCE-

(Pub. L. 93-406, title I, Sec. 510, Sept. 2, 1974, 88 Stat. 895.)

42 USC §1981

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

CHAPTER 21 – CIVIL RIGHTS

SUBCHAPTER I – GENERALLY

-HEAD-

Sec. 1981. Equal Rights under the Law

-STATUTE-

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce Contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

-SOURCE-

(R.S. Sec. 1977; Pub. L. 102-166, title I, Sec. 101, Nov. 21, 1991, 105 Stat. 1071.)

CONGRESSIONAL FINDINGS

Section 2 of Pub. L. 102-166 provided that: "The Congress finds that –

"(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

"(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

"(3) legislation is necessary to provide additional protections against unlawful discrimination in employment."

PURPOSES OF 1991 AMENDMENT

Section 3 of Pub. L. 102-166 provided that: "The purposes of this Act [see Short Title of 1991 Amendment note above] are –

"(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

"(2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

"(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

"(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."

LEGISLATIVE HISTORY FOR 1991 AMENDMENT

Section 105(b) of Pub. L. 102-166 provided that: "No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act [see Short Title of 1991 Amendment note above] that relates to Wards Cove - Business necessity/cumulation/alternative business practice."

CONSTRUCTION OF 1991 AMENDMENT

Section 116 of title I of Pub. L. 102-166 provided that: "Nothing in the amendments made by this title [enacting section 1981a of this title and amending this section, sections 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111, and 12112 of this title, and section 626 of Title 29, Labor] shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."

ALTERNATIVE MEANS OF DISPUTE RESOLUTION

Section 118 of title I of Pub. L. 102-166 provided that: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title [enacting section 1981a of this title and amending this section, sections 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111, and 12112 of this title, and section 626 of Title 29, Labor].".

42 USC §1983

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

CHAPTER 21 – CIVIL RIGHTS

SUBCHAPTER I – GENERALLY

-HEAD-

Sec. 1983. Civil Action for Deprivation of Rights

-STATUTE-

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

-SOURCE-

(R.S. Sec. 1979; Pub. L. 96-170, Sec. 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, Sec. 309(c), Oct. 19, 1996, 110 Stat. 3853.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1437c-1, 1988, 1997e of this title.

42 USC §1988

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

CHAPTER 21 – CIVIL RIGHTS

SUBCHAPTER I – GENERALLY

-HEAD-

Sec. 1988. Proceedings in Vindication of Civil Rights

-STATUTE-

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of

the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

-SOURCE-

(R.S. Sec. 722; Pub. L. 94-559, Sec. 2, Oct. 19, 1976, 90 Stat. 2641; Pub. L. 96-481, title II, Sec. 205(c), Oct. 21, 1980, 94 Stat. 2330; Pub. L. 102-166, title I, Secs. 103, 113(a), Nov. 21, 1991, 105 Stat. 1074, 1079; Pub. L. 103-141, Sec. 4(a), Nov. 16, 1993, 107 Stat. 1489; Pub. L. 103-322, title IV, Sec. 40303, Sept. 13, 1994, 108 Stat. 1942; Pub. L. 104-317, title III, Sec. 309(b), Oct. 19, 1996, 110 Stat. 3853; Pub. L. 106-274, Sec. 4(d), Sept. 22, 2000, 114 Stat. 804.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1981a, 1997e, 3602 of this title.